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Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT IN ANSWER TO SUPPLEMENTAL MEMORANDUM SUBMITTED ON THE ARGUMENT BY THE ADMINISTRATOR

ROSWELL P. C. MAY,
W. GREGORY SMITH,
Counsel for Respondent.

BLEAKLEY, PLATT & WALKER,
New York City.
Of Counsel.

SMITH & AXTELL,
Jacksonville, Florida.

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(1)

Permission to submit this brief, was granted on the argument.

The broad statements made by the Administrator are not borne out in his references. The Senate debate on the Conference Agreement opened with the statement of Senator Bailey that "I consider the bill manifestly unconstitutional" (Cong. Rec., Vol. 83, Part 8, p. 9166), the reason given being that commerce did not extend to manufacture and mining. Senator Borah's remark, quoted in Note 1, had reference to power as distinguished from scope of coverage. As to the latter Senator Borah later said, obviously referring to the definition of commerce in the Act (Italics ours, Cong. Rec., Vol. 83, Part 8, p. 9175):

> "We have gone no further than to announce the general principle as to those engaged in interstate

> commerce and if the Court finds, as it must find, pro or con upon the question, the particular case must fall or rise according to whether the Court finds the parties are engaged in interstate commerce. *But we have not extended the rule by the measure itself.* We have said that those employed in interstate commerce are to be covered. The Court must determine whether or not they are employed in interstate commerce."

Senator Wagner's prediction, also quoted in Note 1, was after reference to decisions of this Court construing the National Labor Relations Act. Senator Wagner obviously did not have in mind the difference in coverage of necessity resulting from the different language used in the two Acts (Cf. *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 351).

Note 2 is cited as authority for references to Employers Liability cases in this Court said to have been made in Congress and in Committee hearings prior to the Conference Agreement.

The first reference is to 83 Cong. Rec., Part 7, p. 7434. On that page, Mr. Randolph quoted from the case of *Santa Cruz Fruit Packing Co.* v. *The National Labor Relations Board*, 303 U. S. 453, which in turn referred to the test under the Employers Liability Act. The discussion at that time was with reference to Section 6 of the House Bill as it then read. The title was "Industries Affecting Commerce" and the section was one conferring upon the Secretary of Labor power to determine the coverage of the Act. 83 Cong. Rec., Part 7, p. 7433.

The second reference is to pages 9170-9172, 83 Cong. Rec., Part 7. This reference is to the Senate debate on the Conference Agreement in which there was reference to the Employers Liability Act and some of the cases of this Court thereunder, but the reference was in the course of a debate upon the constitutionality of this Act.

as shown by the colloquy between Senator Bailey and Senator Borah beginning in the middle of the second column of page 9170. The senators were talking about power, not the extent of coverage contemplated in the Act by the use of the term "engaged in interstate commerce".

We are next referred to the statement in Committee hearings prior to the Conference Agreement. The first reference (pp. 42-43) shows the following:

> "Representative Thomas: Where in the Act is there any yardstick laid down that defines directly 'affecting interstate commerce'?
>
> Mr. Jackson: That is a very difficult thing to define. The courts define it for themselves. They hold some types of railroad labor are in interstate commerce; and other types of railroad labor that are difficult for me to distinguish, the Court thinks are not in interstate commerce because of the effect of their work."

The reference here was to one of the bills which covered occupations "affecting" commerce and is not apropos to the bill as finally passed.

The discussion in the Committee Hearing continued on to the question as to when commerce would begin and when it would end (p. 43) and the following was said:

> "Senator Pepper: Is it not a fact that that same question is already being decided by the courts, now under existing law, where the States have attempted to regulate things which are in interstate commerce, and it is a question whether they come to rest within the State to such a degree that they become divested of their interstate character?
>
> Mr. Jackson: That is right. And it is also being decided in the Employers Liability cases. It is being decided in all these interstate commerce cases, and it is very perplexing to decide what the principle is."

This reference again was to the Act as it then stood, prior to the changes affected by the Conference Agreement.

The next reference given in Note 2 is to page 59 of the minutes of the joint Committee hearings. This consisted of a portion of a statement submitted by Mr. Jackson consisting of a *constitutional* analysis of the bill. It was said:

> "It is already established that the conditions of employment of workers immediately engaged in commerce may be regulated by Federal Law. (*Wilson* v. *New*, 243 U. S. 332; *Virginia Railway Co.* v. *System Federation*, October Term 1936, decided March 29, 1933; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, decided April 12, 1933.)".

Note that nothing here is said about Employers' Liability cases. The statement was discussing power.

Wilson v. *New* involved constitutionality of the Hours of Service Act (34 Stat. 1415, U. S. C. A. Title 45, Sec. 61, *et seq.*). Section 1 of that Act provides that "the term 'employees' as used in this chapter shall be held to mean persons actually engaged in or connected with the movement of any train."

The *Virginia Railway* case involved the Railway Labor Act, 44 Stat. 577, U. S. C. A. Title 45, Sec. 151, *et seq.*, which specifically provides that "the term 'employee' as used herein includes every person in the service of a carrier who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect • • • ."

Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board* simply held that a coach company engaged in interstate transportation for hire came within the provisions of the National Labor Relations Act.

It is clear that this statement made in the hearing had reference to the power of Congress and was not inserted in an effort to demonstrate that employees engaged in maintenance of facilities or instrumentalities which others use in commerce are themselves engaged in transportation or commerce.

In Note 3 there is quoted a colloquy between Senator Borah and Senator Bailey with reference to railroad systems. If Senator Bailey's position was that every employee in a railroad system comes within the coverage of the Act, then it is directly contrary to the above quoted statement of Senator Borah, one of the conferees, and also to the following statement of Senator Pepper, another conferee, made during the same debate (83 Cong. Rec., Part 8, p. 9168).

> "Mr. Pepper: I think it is vital that we should keep clearly in mind the distinction between what the Senator from North Carolina has suggested and what is in this bill as to the objectives of the bill and its application legally. If the Senator will regard section 6 of the conference report he will find it reads as follows:
>
> > Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates.
>
> And section 7, which deals with maximum hours, reads thus:
>
> > No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> More than the hours specified in the section.

So that the conference committee had before it the question of whether this proposed law should be ap-

plied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce.

The power to affect those employed in interstate commerce is, I assume, definitely admitted by the Senator from North Carolina. Jurisdiction over employees engaged in the production of goods for interstate commerce is as vital to the exercise of the power to regulate commerce as the source of a river is to the river itself or the origin of a spring to the stream which flows away from it.

I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

Senator Pepper's clear statement would seem to dispose of any intimation by Senator Bailey, who was opposing the bill, that it might cover every employee of an entire railroad system. The bill covers employees of railroad companies who are engaged in commerce or in production of goods for commerce in the same way that it covers employees of any corporation or employer where such employees are engaged in commerce or in the production of goods for commerce.

On page 3 of the Administrator's Supplemental Memorandum reference is made to a statement made in the House debate on the Conference Agreement by one of the members who served on the Conference Committee. That same

member stated in the course of this same statement (83 Cong. Rec., Part 8, p. 9260):

> "It must be repeated, however, to avoid any misunderstanding of the bill, that it does not in any way, shape, or form affect intrastate or purely local or state business. It covers only interstate commerce; that is, business which is interstate in character."

In the face of these self-contradictions by a House of Representatives member of the Joint Committee, it is submitted that debates in which members of Congress have given their opinion as to the coverage of the Act are not the best evidence of Congressional intention. The best evidence is found in the structure and language of the Act itself, in particular in the inclusion at one point and the exclusion at another of "necessary occupations", and in what Congress did, as distinguished from what some of its members said, prior to the passage of the Act, i. e., in its elimination of the provisions regulating employers "engaged in commerce in any occupation affecting commerce". It is submitted that this action speaks louder than words.

These references to the Employers Liability Act, along with references to the Interstate Commerce Act, The National Labor Relations Act, and many other regulatory acts of Congress and decisions of this Court sustaining or construing the same, which were frequently made at one time or other during the Committee hearings and in the debates in both Houses, principally with relation to the question of constitutionality, go very far from establishing the existence of an intent on the part of Congress, in this carefully drawn Act, preceded by its definite rejection of important amendments, to adopt tests phrased by this Court at various times in varying language in construing the Federal Employers Liability Act. It is very far from

the practice of Congress in recent legislation of being "reasonably explicit" in matters of this kind.

> *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 522;
> *Federal Trade Commission* v. *Bunte*, *supra*, at pages 351, 355.

Had Congress really had in mind the embodying in the Fair Labor Standards Act the formulae employed by this Court in cases under the Employers Liability Act, we would have found elaborate discussions of those various formulae and a discussion of the fundamental difference between the two Acts.

It would have been pointed out in debates and reports that the one Act was for the benefit of employees engaged in the more hazardous phases of railroad maintenance and operation, whereas this Act was intended to be for the benefit of employees engaged generally in interstate commerce or production of goods for interstate commerce without regard to the physical hazards. It would have been pointed out that the test under the Employers Liability Act has been as to whether or not the employee was engaged in transportation at the time of the accident; that the application of that doctrine to the present Act might result in the exclusion of employees who ought fairly to be included and the inclusion of employees not intended to be included; that a test applicable to the employees of one type of corporation, i. e., interstate common carriers by rail, might not be satisfactory when applied to the many other types of businesses intended to be covered in the broad definition of commerce as "trade, commerce, transportation, transmission and communication". For example, if Congress intended to include in the Act maintenance employees of railroads, why include employees repairing the roadbed, and exclude a station agent killed by a passing train while sweeping the platform, as would have to be

done if the Employers Liability test were followed (*Central R. R. of New Jersey* v. *Gasser*, 112 Pa. Super. 420, certiorari denied 293 U. S. 565).

As stated in *Federal Trade Commission* v. *Bunte, supra:*

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

(2)

Finally, the Court is asked to follow Interpretive Bulletin No. 5 issued by the Wage and Hour Division (Note 4) which reads, after supplying the omissions in the Administrator's brief:

> "13. Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce *would seem* to be engaged in interstate commerce and subject to the Act." (Italics ours.)

The theory underlying this ruling is that employees are engaged in interstate commerce because they repair or maintain instrumentalities used by others in interstate commerce. This is a fallacious theory.

There is no magic in the word "instrumentality". Commerce or transportation are conducted by persons, real or, in the case of corporations, fictitious. In the course of the conduct of their commerce or transportation, those persons use things; which things, because of being used by persons in the conduct of their commerce or transportation, are called instrumentalities of commerce. But other and different persons who may be engaged in repairing or maintaining those things are not engaged in commerce or tranportation. They simply facilitate the commerce or

transportation carried on by those engaged in such commerce or transportation and who use the instrumentalities in the actual conduct of their commerce or transportation. That those engaged in the maintenance or repair of such instrumentalities of commerce carried on by others may be subject to the power to regulate commerce, is not here the question. That they are neither engaged in commerce nor in transportation when all they do is to maintain or repair instrumentalities or facilities which other people, in fact engaged in commerce or transportation, make use of, should likewise not be open to question.

Respectfully submitted,

ROSWELL C. P. MAY,
W. GREGORY SMITH,
Counsel for Respondent.

January 13, 1943.